

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

SAMUEL L. GOODWIN, JR.

Claimant

V.

**TRAINING REHABILITATION &
DEVELOPMENT INSTITUTE, INC. AND
FEDERAL EXPRESS CORPORATION**

Respondents

AND

**ARGONAUT INSURANCE CO. AND
FEDERAL EXPRESS CORPORATION**

Insurance Carriers

Docket Nos. 1,074,408
& 1,052,679

ORDER

Training Rehabilitation & Development Institute, Inc., and Argonaut Insurance Company (TRDI), through Kim Martens, request review of Administrative Law Judge Thomas Klein's December 18, 2015 motion hearing Order. Anton C. Andersen appeared for Federal Express Corporation, a self-insured respondent (FedEx). Joseph Seiwert appeared for claimant.

The record on appeal is the same as the judge considered and consists of claimant's August 11, 2015 deposition transcript and exhibits, the December 10, 2015 motion to quash hearing transcript, the December 10, 2015 preliminary hearing transcript and exhibits (all in Docket No. 1,074,408), the October 28, 2015 post-award medical hearing transcript in Docket No. 1,052,679 and exhibit, and all pleadings in the administrative files.

FACTUAL STATEMENT & ISSUES

Claimant had a workers compensation claim against FedEx for an October 4, 2010 back injury. This case was assigned Docket No. 1,052,679. On February 8, 2013, the claim was settled, leaving open his right to future medical benefits. On June 29, 2015, claimant filed an application for post-award medical benefits.

On July 8, 2015, claimant initiated a new and separate workers compensation claim against TRDI for an alleged June 14, 2015 back injury. This case is Docket No. 1,074,408.

Claimant sought to have both matters heard simultaneously. TRDI filed a "Motion to Quash Consolidation and Request for Protective Order and Notice of Hearing" (motion). The judge issued two orders dated December 18, 2015, that were sent to all counsel in both cases. In one order listing both docket numbers, the judge consolidated the cases on the court's own motion and ordered an independent medical evaluation.

In the other order, the judge denied TRDI's motion, stating:

Both this case against TRDI, and the previous case against Federal Express involve the claimant's lower back. A post award hearing was held in case number 1052679 on October 28, 2015, and Dr. Murati's report was admitted in to evidence and terminal dates were set. Dr. Murati's report clearly finds that a new accident has occurred, implicating TRDI. Counsel for TRDI was not notified of the Post Award Hearing, nor did counsel appear for TRDI.

A preliminary hearing was held in case number 1074408. In the course of that hearing, counsel for TRDI introduced medical evidence and argued among other defenses that claimant's condition and need for treatment were an aggravation of his pre-existing condition, clearly implicating Federal Express. Counsel for Federal Express was aware of the hearing but could not attend and so informed the court October 28, 2015.

Counsel for TRDI argues that this separation should continue. In support of this position counsel argues that consolidation complicates the litigation and confuses counsel, physicians, and appellate boards by introducing separate standards of evidence, review and appeal, somehow compromising its prospective procedural and substantive rights. During argument for this motion, counsel for TRDI implied that the court had inappropriately behaved when it considered the possibility that TRDI's legal position could be contrary to the parties that were present in case number 1052679.

The court denies TRDI's motion. Counsel would like to object that it's rights are impugned in another case number while unreservedly introducing evidence against Federal Express within their own case, denying Federal Express's ability to be heard. Counsel's arguments that consolidation is somehow too complicated for courts and physicians and counsel to deal with is without merit and more than a little impertinent. The circumstances of this case are on the contrary, quite ordinary. Two or more physicians with different opinions on treatment recommendations and causal factors is by no means a rarity.

After the cases were consolidated, TRDI appealed the denial of its motion in Docket No. 1,074,408 only. TRDI did not appeal the judge's consolidation of the two docketed cases in the other order. TRDI argues it potentially risks prejudice because post-award medical proceedings and preliminary hearings involve different statutory schemes, evidentiary standards, procedural rules and appeal rules, which may cause confusion. TRDI further argues it is inappropriate for claimant to unilaterally include in its brief to the Board a caption identifying Docket No. 1,052,679, because FedEx was not a party or present at the hearing in Docket No. 1,074,408. TRDI also argues there is no statutory basis for consolidation and Kansas precedent establishes the judge should not have consolidated the two cases.

Both claimant and FedEx identify the issue as whether the judge properly consolidated the two docketed cases. FedEx joins TRDI's arguments, noting the two cases involve "diametrically different standards" and present "innumerable issues."¹ If the cases remain consolidated, FedEx asserts it faces post-award attorney fees and could be paying claimant's attorney for his work against TRDI. FedEx requests the Board reverse the judge's order consolidating the two docketed cases. Claimant maintains the Order should be affirmed.

The issues are: (1) when docketed cases have already been consolidated, does an appeal of an order listing only one docketed case pertain only to that docketed case instead of both consolidated cases, and (2) does the Board have jurisdiction to review TRDI's appeal of the Order?

PRINCIPLES OF LAW & ANALYSIS

1. When separate cases are generally consolidated, an appeal of one docket is an appeal of all dockets.

The judge ordered the cases consolidated. After the consolidation, TRDI appealed the denial of its motion in only one of the two docketed cases. When claimant filed his brief, he included both docketed cases. TRDI complained that claimant improperly added the 2010 docketed case to the caption in his brief because only the 2015 docket was appealed.

In *Solis*,² the assistant director ordered two separate cases be consolidated. One respondent appealed only one of the docketed cases and argued the other employer had no standing in the appeal because the other docketed case was not appealed. The Board disagreed and the Supreme Court of Kansas affirmed the Board's decision, holding:

This argument is without merit. It is undisputed that Docket No. 190,678 and No. 220,773 were consolidated. Although only Hartford petitioned the Board for review, K.S.A. 44-551(b)(1) does not limit the Board's scope of review to issues raised in the written request for review. Rather, once a party files a written request for review of the administrative law judge's decision, the Board has the authority to address every issue decided by the administrative law judge. *Woodward v. Beech Aircraft Corp.*, 24 Kan.App.2d 510, 516, 949 P.2d 1149 (1997). See *Helms v. Tollie Freightways, Inc.*, 20 Kan.App.2d 548, 553, 889 P.2d 1151 (1995). Because the two cases were never severed, the Board had jurisdiction to address any of the issues raised in the consolidated cases, and KLA was a proper party.

¹ FedEx Brief at 2.

² *Solis v. Brookover Ranch Feedyard, Inc.*, 268 Kan. 750, 753, 999 P.2d 921 (2000).

In *Davenport*,³ only one of two docketed cases was appealed. Because the judge never formally ordered the cases consolidated and only one case was appealed, the Board was incorrect to consider both cases as appealed. However, *Davenport* states that when separately docketed cases are explicitly consolidated, an appeal of one case is an appeal of the other case: "Absent a general order of consolidation by the ALJ, as was the case in *Solis*, the claims remain separate and distinct for appellate purposes."⁴

The two docketed cases in this matter were consolidated before the appeal in Docket No. 1,074,408. According to *Solis* and *Davenport*, when cases are generally consolidated, an appeal of one case is an appeal of all of the consolidated cases. Therefore, while TRDI appealed only one order in one docketed case, the cases were already consolidated and an appeal of one case is an appeal of all joined cases.

2. The Board lacks jurisdiction to hear TRDI's appeal.

The 2011 and 2014 versions of K.S.A. 44-555c(a) give the Board jurisdiction to review a judge's decision, finding, order or award. Both versions of K.S.A. 44-551 give the Board jurisdiction to review "[a]ll final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a" The applicable versions of K.S.A. 44-534a and K.S.A. 44-551 allow the Board to review specific jurisdictional issues from a preliminary hearing order.

TRDI's appeal is not from a preliminary decision or a final order or award. The judge's order is not a final order. The judge may revisit this matter and could even decide to sever the consolidation, a possibility noted in the prior quotation from *Solis*. Consolidation orders are interlocutory orders within a judge's authority in controlling his or her docket.⁵ TRDI's appeal is dismissed because the Board lacks jurisdiction to review the Order until it is contained in a final order or award.

Arguendo, even if the Board had jurisdiction to hear the appeal, TRDI would face a significant burden. As noted in *Solis* and *Davenport*, workers compensation claims may be consolidated. Such practice is common and may best serve justice and judicial economy.⁶ A ruling to consolidate workers compensation claims is reviewed based on the

³ *Davenport v. Marcon of Kansas, Inc.*, No. 111,888, 2015 WL 1125155 (Kansas Court of Appeals unpublished opinion dated Mar. 6, 2015), rev. denied Jan. 25, 2016.

⁴ *Id.* at *7.

⁵ See *Bagby v. Prairie Village Animal Hosp., P.A.*, No. 1,020,548, 2005 WL 1983415 (Kan. WCAB July 1, 2005).

⁶ See *Burnett v. Fiberglass Engineering, Inc.*, Nos. 220,246 & 223,942, 2003 WL 22401236 (Kan. WCAB Sep. 30, 2003); *Magana v. IBP, Inc.*, Nos. 236,071, 241,633 & 256,300, 2004 WL 1058376 (Kan. WCAB Apr. 22, 2004).

judge's discretion.⁷ The Board typically will not interfere with the judge's discretion in controlling a docket.⁸ If the Board were to entertain TRDI's arguments, the standard of review would be based on an abuse of discretion, as in district court.⁹ "A trial court abuses its discretion when no reasonable person would take the view adopted by the trial court, when the judicial action is based on an error of law, or when the judicial action is based on an error of fact."¹⁰

While the Board does not have jurisdiction to review the appeal, the cases cited by TRDI for the proposition that consolidation should not be permitted are inapposite. In *Prinz*,¹¹ a mortgage case, three separate plaintiffs brought separate actions against one defendant. A trial was only held between Prinz and the defendant, but the attorneys in all of the actions agreed the evidence obtained should be used in the subsequent proceedings. After a judgment against defendant, Prinz was denied a motion for a new trial and the court consolidated the other two actions with that of Prinz for the purposes of an appeal. The Kansas Supreme Court simply stated:

The procedure thus attempted of consolidating several causes of action between different parties for the purpose of prosecuting proceedings in error cannot be sustained. The petition in error of Prinz & Co. against [defendant] is properly before us, and is the only cause to be considered.¹²

Likewise, *Rakestraw*¹³ does not compel a different result. Such case simply indicated wholly separate causes of action against the state for violation of statutory law and against a contractor for common law negligence should not have been joined. While causes of action could be joined, under the civil procedure at the time, the causes of action had to affect all the parties. The causes of action did not affect all parties, thus the causes should not have been joined.

⁷ See *Davenport*, fn. 4.

⁸ *Vargas-Jaramillo v. Marriott Int'l, Inc.*, No. 241,554, 2001 WL 403320 (Kan. WCAB Mar. 9, 2001). However, Board Members have suggested that claims be consolidated. *Sweet v. Diamond Engineering Co.*, No. 1,035,983, 2008 WL 924561 (Kan. WCAB Mar. 12, 2008); *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, No. 1,021,836, 2005 WL 2181258 (Kan. WCAB Aug. 22, 2005); *Moreland v. Falley's, Inc.*, No. 253,860, 2000 WL 1929349 (Kan. WCAB Dec. 21, 2000); *Smith v. National Vision Center*, Nos. 206,033 & 220,001, 1997 WL 229443 (Kan. WCAB Apr. 14, 1997).

⁹ *Poff v. IBP, Inc.*, 33 Kan. App. 2d 700, 704, 106 P.3d 1152 (2005).

¹⁰ *State v. Seacat*, ___ Kan. ___, ___ P.3d ___, No. 110,360, 2016 WL 181732 (2016).

¹¹ *Prinz et al. v. Moses*, 66 Pac. 1009 (1901).

¹² *Id.*

¹³ *Rakestraw v. State Highway Comm.*, 143 Kan. 87, 53 P.2d. 482 (1936).

Claimant's two docketed cases do not present wholly different causes of action. While the particular statutes in the Kansas Workers Compensation Act, as it existed before and after May 15, 2011, are undeniably different, they are not so different as to require precluding consolidation of the cases. That is especially true where the highest court in Kansas has recognized the practice of consolidation in workers compensation cases, technical rules of procedure are relaxed under K.S.A. 44-523 and there is no rule, unlike in *Rakestraw*, which precludes consolidation.

As for the concern FedEx has regarding attorney fees, such issue is not ripe for adjudication. No attorney fees have been awarded and, if awarded, the Board will wait and see if claimant's attorney only requests fees for his work in the post-award matter or if the judge would apportion fees, such that FedEx would not be "bankrolling" claimant's case against TRDI.

CONCLUSION

Both docketed cases were consolidated and an appeal in one case is an appeal in both cases according to the Supreme Court of Kansas. The Board lacks jurisdiction to entertain TRDI's appeal of the interlocutory order.

WHEREFORE, the Board dismisses TRDI's appeal of the December 18, 2015 Order.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

BOARD MEMBER

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SAMUEL L. GOODWIN, JR.

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